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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, ET AL., *PETITIONERS*

—v.—

NEW YORK STATE EDUCATION DEPARTMENT, *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ~~APPELLEE~~ RESPONDENT BOARD OF EDUCATION, UNION FREE SCHOOL DISTRICT No. 27, TOWN OF HEMPSTEAD

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TABLE OF CONTENTS

	Page
Introduction	1
Statement	3
Argument	5
Point I — New York Education Law §701 is free of any discriminatory purpose and effect, is supported by a compelling governmental interest, and is rationally related to a legitimate state end. Its challenged constitutionality is in essence an attack upon the policy making function of the Legislature	5
Point II — The Constitutional claim of discrimination against indigent children is without merit. The rejection of a three judge court was proper since the Constitutional claim is unsound as evidenced by previous decisions of this Court	9
Conclusion	11

TABLE OF AUTHORITIES

California Water Service Co. v. *City of Redding*, 304 U.S. 252 (1938) 11
Dandridge v. *Williams*, 397 U.S. 471 (1970) 6, 10
Idlewild Bon Voyages Liquor Corp., v. *Epstein*, 370 U.S. 713 (1962) 10
James v. *Valtierra*, 402 U.S. 137 (1971) 9, 10
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 6
Mc Donald v. *Board of Elections*, 394 U.S. 802 (1969) 6, 7
Mc Gowan v. *Maryland*, 366 U.S. 420 (1961) 6
Mc Innis v. *Shapiro*, 293 F. Sup. 327, aff'd. 394 U.S. 322 8
Shelton v. *Tucker*, 364 U.S. 479 (1960) 6
Snell v. *Wyman*, 281 F. Sup. 853, (1968), aff'd. 8, 393 U.S. 323 (1969).

New York Statutes:

New York Education Law § 701 ..... 2, 5, 10
New York Education Law § 703 ..... 2, 5
New York Education Law § 1716 3
New York Education Law 2023 3
New York Education Law 2024:4 4
New York Education Law 3209 10
New York Education Law § 3635 4

Opinion:

Opinion No. 213, (1967), of Counsel,
New York State Education Department,
7 State Ed. Dep. 153 3

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Introduction

This is an action commenced by three parents individually and on behalf of their minor children who attend the schools operated by the appellee Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, commonly known as the West Hempstead Public Schools. Appellants appeal from a decision of the Court of Appeals reported at 449 F2d 871 (1971) affirming the decision and order of the District Court reported at 319 F. Supp. 271 (1970) which denied the convening of a three judge District Court and dismissed the complaint.

The action centers an attack upon New York Education Law §701 and §703 [McKinney's Consol. Laws, 1971]. The former, in substance, authorizes a board of education to loan textbooks without charge to children enrolled in grades seven to twelve. No similar provision exists for children enrolled in grades one through six. The latter section in substance, authorizes a board of education to furnish free textbooks to pupils in grades one through six only upon the voting of a tax therefore by the qualified voters of the school district.

The First Cause of Action claims that §701 invidiously discriminates by creating an arbitrary and discriminatory classification which deprives plaintiffs and members of their class of equal protection of the law and an adequate education. The Second Cause of Action alleges that §701 and §703 impose a majority vote approval of a tax assessment to enable children in grades one to six to receive free textbooks and that this constitutes a denial of equal protection. A Third Cause of Action states that pursuant to §701 and §703, textbooks can be obtained in grades one to six only upon the payment of a rental fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; and that by reason of their poverty their children are deprived of equal educational opportunity.

The only claim now argued in this Court relates to the Third Cause of Action. Essentially, appellants urge here that §701 discriminates against indigents and that this raises a substantial constitutional question which requires that a three judge court be convened. For the reasons hereinafter set forth, this claim should be rejected.

It should also be expressly noted at this point, that the West Hempstead Public Schools, effective July 1, 1972, no longer has been operating under an austerity or contingency budget. A proposed budget for the forth-

coming school year was approved by the qualified voters on May 3, 1972. Textbooks are being furnished free to all students regardless of thier grade level.

Statement

On separate occasions in 1970 and 1971 the qualified voters of Union Free School District No. 27 defeated proposed budgets submitted to them by the Board of Education. These budgets were presented for voter approval in accordance with §1716 of the New York Education Law and consisted of a detailed statement in writing of the amount of money which would be required for the ensuing year for school purposes exclusive of public moneys. Included in the overall budgets, and not separately voted upon were appropriations for textbooks.

In the absence of voter approval, the Board as required by law, became obligated to operate on a contingency or austerity budget (Education Law §2023). Under such a budget, the Board is authorized to levy a tax upon the qualified voters as if such tax had been approved by the voters, but only for a sum estimated necessary for "ordinary contingent expenses" and for teachers' salaries but not for all the expenditures set forth in the proposed budget. Ordinary contingent expenses have been defined as those expenditures authorized by statute, legal obligations of the district, and those items necessary to maintain the educational program, preserve school property and assure the health and safety of students and staff (see 7 State Education Department 153, Formal Opinion of Counsel 213, dated July 6, 1967). Illustrative of the items deemed to be included in the latter category are: instructional supplies for teacher use; maintenance of school facilities; and materials used in classes of students where uniformity is essential to the program or to preserve health and safety (i.e. dangerous chemicals

for a chemistry class). Clearly, the phrase "ordinary contingent expenses" was intended to limit expenditures under an austerity budget to those of a greater necessity than instructional supplies for students. Excluded from the definition of an "ordinary contingent expense" are those expenditures, which by law, may only be authorized by the qualified voters of a school district. Examples of such expense would be transportation for a distance less than three miles in grades nine to twelve and for a distance less than two miles in grades from kindergarten to eight; (see §3635 New York Education Law); and textbooks for children in classes below the seventh grade (see New York Education Law §703, subd. 2). §2024 of the New York Education Law provides that if any question shall arise as to what is an "ordinary contingent expense", the same may be referred to the Commissioner of Education. His decision shall be conclusive.

Accordingly, since the proposed budgets submitted in 1970 and 1971 were not approved, the Board of Education was without power and authority to furnish textbooks free to pupils enrolled in grades one to six.

Our position throughout this litigation was and continues to be that textbooks for all pupils are essential to a quality educational program. The action of the Legislature was not discriminatory. It simply did not go far enough. We have stated this in our opposing affidavits to the initial application of plaintiffs (A 40, 41) as well as in our formal Answer (A 35) and in our briefs. We have also several times stated our position that we oppose this litigation principally because we believe the remedy lies with the New York State Legislature (A 36, 40).

Argument

POINT I

New York Education Law § 701 is free of any invidious discriminatory purpose and effect, is supported by a compelling governmental interest, and is rationally related to a legitimate state end. Its challenged constitutionality is in essence an attack upon the policy making function of the Legislature.

Prior to 1965, the New York Education Law made no provision for free textbooks. At that time, §701 provided that school authorities may purchase textbooks and either rent or sell the same to the pupils attending the public schools. Under former §703, it was left to the voters in each school district to levy a tax for the purchase of textbooks to be furnished free to children attending the public schools in grades one to twelve. Under the 1965 amendment to §701, school districts were authorized to furnish free textbooks up to a certain average cost, to children enrolled in grades seven to twelve in public or private schools. Under the 1965 amendment to §703, it was left to the voters in each school district to levy a tax to furnish free textbooks in grades one to six.

The effect of these amendments was to require that free textbooks be furnished to all children in grades seven to twelve without voter approval, but that voter approval was required to do likewise for children in grades one to six.

In examining this classification, when attacked as a denial of equal protection, one must consider either of two constitutional standards. *First,* is the classification

rationally related to a legitimate state end. [see *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969)]; *McGowan* v. *Maryland*, 366 U.S. 420 (1961), *second*, is the classification justified by a compelling state interest. [see *Shelton* v. *Tucker*, 364 U.S. 479 (1960)]. Either standard may apply and would be sufficient to withstand a claim of denial of equal protection. The District Court applied the second standard and found a compelling state interest. The Court of Appeals, (A67), in indicating that both standards were appropriate in a case such as this, cited *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970) and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The Court of Appeals quoting from *Dandridge* at p. 485, 486, said:

> "The Court recognized that in the area of economics and social welfare, even where such legislation involves 'basic economic needs of impoverished human beings,' the Fourteenth Amendment gives the federal courts no power to impose upon the State their views of what constitutes wise economic or social policy."

The Court of Appeals indicated the long acceptance of this position as espoused in *McGowan* v. *Maryland*, *supra*, 366 U.S. at 426, which case stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affects some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests upon grounds wholly irrelevant to the achievement of the State's objectives...A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

So we have under attack, the action of the New York State Legislature, not for authorizing distribution of free

textbooks to secondary school students, but for not going further and also authorizing such free distribution to elementary school students. Obviously, had New York not provided textbooks without charge to secondary school students, there would be no case before this Court. (A71).

The District Court held in essence that the 1965 amendments resulted from action on a reasonable basis, free from irrationality or arbitrariness; that the Legislature was entitled to allocate its funds to pupils in those grades where it would do the most good; and that New York had a compelling interest in seeing to it that as many as possible of its children receive textbooks.

In *McDonald* v. *Board of Elections, supra,* 394 U.S. 802 (1969), the Court said:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally ...and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

The Court of Appeals (A 66) expressed the view with which we firmly agree, to the effect that its function was not to enact laws for the State of New York or to tell

the Legislature how better they could have legislated. It observed that it was restricted to making an examination of the law as actually enacted and to determining whether there was a reasonable basis for such classification. The Court concluded (A 73):

> "Unless the courts are to take over legislative functions and to decree that all children in all grades are to have free textbooks, the judgment of the legislature should control."

So also, the District Court concluded by citing *Snell* v. *Wyman*, 281 F Supp 853, 862 (SD NY 1968) aff'd. 393 U.S. 323 (1969).

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment."

The District Court also referred to *McInnis* v. *Shapiro* 293 F Sup 327, (N.D. Ill. 1968) aff'd. 394 U.S. 322, where after a discussion of cultivating the educational potential of each child, the Court quoted from *McInnis* as follows in part:

> ". . . But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court".

POINT II

The Constitutional claim of discrimination against indigent children is without merit. The rejection of a three judge court was proper since the Constitutional claim is unsound as evidenced by previous decisions of this court.

Appellants press the argument that they are subjected to an unfair burden in that they could not have textbooks unless approved by the voters. This thesis was clearly rejected by *James* v. *Valtierra,* 402 U.S. 137 (1971) in which a California statute which provided that low income housing could not be built without voter approval was under attack. This Court approved this arrangement because "referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice."

Now can it be gainsaid that voter approval for textbooks in grades one to six is indicative of bias, discrimination or prejudice. Rather it is to be noted that the voters in West Hempstead, after consistent budget rejection, finally approved their school district budget on May 3, 1972 and are no longer operating on an austerity or contingent budget. Clearly these referenda, whatever the result, demonstrated the will of the electorate which in the final analysis is the bed-rock of our democratic processes.

Appellants contend that the voters should not be privileged to refuse to supply textbooks. This argument is based on a group of cases providing indigents, especially indigents accused of crime, access to the courts and free legal counsel. As the Court of Appeals noted (A 72), the reasoning of these cases is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. "*Obviously, though, due process is not involved here.*" [Emphasis supplied]

The claim that §701 discriminates against indigents is in fact a plea to avoid voter approval of funds for textbooks for elementary school children. It should be rejected for additional grounds on the basis of *Valtierra supra.* §701 makes no differentiation based on income level of the proposed recipients. As the Court of Appeals noted (A 70) referring to §701 "it instead draws the lines according to grade level. Thus clearly, this law is a valid means by which New York leaves some control over the school budgets to the voters of affected school districts."

In *Dandridge* v. *Williams supra,* 397 U.S. 471, 484 (1970) the Supreme Court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because 'in practice it results in some inequality' ".

Moreover, we would note New York State Education Law §3209 as part of Article 65 relating to compulsory attendance, provides as follows:

> "Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, *books,* food and other necessaries to enable them to attend upon instruction as hereinbefore required by law". [Emphasis supplied]

Finally, on the basis of all of the foregoing, it is manifest that the denial of the motion to convene a three judge court was proper. The constitutional questions raised are not substantial. (See *Idlewild Bon Voyages Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962) in which the Supreme Court stated the guidelines to be that the District Court's inquiry is appropriately limited to determining whether the

constitutional question raised is substantial. In determining substantiality, *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938) held that a district court may reject a constitutional claim "because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." We think the decisions of this Court justify such rejection.

CONCLUSION

The challenge to §701 and §703 of New York's Education Law is an attack upon the policy making function of the Legislature. Appellants' educational arguments might move a legislator and from our point of view, we hope they do. Nevertheless, the responsibility for change rests not with the federal judiciary but with the state legislature. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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